No. 103

Office - Supreme Court, U.S.
FILED
JUL 2 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

vs.

TRUCK DRIVERS LOCAL UNION NO. 449, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A. F. L.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR TRUCK DRIVERS LOCAL UNION NO. 449 IN OPPOSITION

McMAHON & CROTTY,
Counsel for Respondent,
Office and Post Office Address,
1028 Liberty Bank Building,
Buffalo 2, New York.

PETER J. CROTTY,
THOMAS P. McMAHON,
of Counsel.

INDEX.

	PAGE
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	2
Statement	2
Reasons for Denying the Writ	6
Conclusion—The Petition for a Writ of Certiorari should be denied	10

Table of Cases.

C. F. Betts-Cadillac-Olds, Inc., 96 N. L. R. B. 268	8
Duluth Bottling Association, 48 N. L. R. B. 35	8
International Shoe Company, 93 N. L. R. B. 159	8
KVOS v. Associated Press, 299 U. S. 269, 279	8
Leonard *et al.*, d/b/a Davis Furniture Co., 94 N. L. R. B. 279; 197 F. 2d 435 (C. A. 9); 100 N. L. R. B. 1016 (on remand); 205 F. 2d 355 (C. A. 9)	4, 6, 7, 8
Morand Brothers Beverage Co., 91 N. L. R. B. 409; 190 F. 2d 576 (C. A. 7); 99 N. L. R. B. 1448 (on remand); 204 F. 2d 529 (C. A. 7)	4
N. L. R. B. v. Sommerset Classics, 193 F. 2d 613 (C. A. 2)	7
People v. Chapman, 370 Ill. 430, 455	8
U. S. v. Tucker, 344 U. S. 33, 38	8
Webster v. Fall, 266 U. S. 507, 511	8

Statutes.

	PAGE
28 U. S. C. 1254	2
National Labor Relations Act, as amended:	
Section 10 (e)	2
61 Stat. 136, 29 U. S. C. 151, *et seq.*	2
Section 8(a)(1) and (3)	2, 4, 5, 9
Section 7	5
Section 402	6, 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

VS.

TRUCK DRIVERS LOCAL UNION NO. 449, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A. F. L.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR TRUCK DRIVERS LOCAL UNION NO. 449 IN OPPOSITION

Opinion Below

The opinion of the Court below (B. A. 17-41) is not yet reported. The findings of fact, conclusions of law, and order of the Board (J. A. 22-32, 38, 41) are reported at 109 N. L. R. B. 447.

Jurisdiction

The judgment of the Court below was entered on March 13, 1956 (B. App. 40-41). The jurisdiction of this Court is

invoked under 28 U. S. C. 1254[1] and Section 10 (e) of the National Labor Relations Act, as amended.

Questions Presented

(1) Whether the Court below properly found that employers who lockout their employees because fellow union members are on strike at another plant violate Sections 8(a)(1) and (3) of the National Labor Relations Act, as amended?

(2) Whether the Court below properly found that this illicit conduct on the part of the individual employers is not made licit by joining a multi-employer group?

Statutes Involved

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), appear in Appendix B to the Board's Petition (B. A. 41-42).

Statement

Linen and Credit Exchange is an unincorporated association composed of eight corporations, engaged in furnishing, supplying and servicing industrial and commercial enterprises with cotton and linen towels, uniforms and related items. The Exchange and seven of the corporations were named as respondents in the action before the Board. The eight corporations have been members of the Exchange for some 13 years during which time each recognized Local 449 as the exclusive bargaining representative for their respective employees, employed as truck drivers (J. A. 25).

The activities of the Exchange and its members are located in Buffalo and certain other communities in the western part of the State of New York (J. A. 24).

---

[1] "B. A." references are to the appendix to the Board's brief. "J. A." references are to the joint appendix to the briefs in the Court below. "R." references are to the pages of the record printed in the joint appendix.

Negotiations of the terms of the collective bargaining agreements were worked out by representatives of the Exchange and Local 449 and then submitted to the membership of the Exchange and Local 449 for majority approval. When majority approval was given, the agreement was signed by each member of the Exchange and by the Secretary-Treasurer and Business Agent for Local 449 (J. A. 25, R. 33).

In accordance with the then existing agreement, Local 449, 60 days prior to the expiration date, gave notice of a desire to change the agreement. Negotiations for a new agreement began some time in March 1953 between the Exchange acting on behalf of its members, and Local 449 on behalf of the truck drivers. The negotiations continued off and on until May 26, 1953 at which time the truck drivers at Frontier Linen Supply Co., a member of the Exchange, went on strike and established a picket line. That evening, the Exchange and Local 449 had a meeting and during that meeting and at one or two subsequent meetings, the non-struck employers told the representative of Local 449 that their employees were locked out because of the strike at Frontier, and that if Local 449 would withdraw its picket line and cease the strike at Frontier, they (the non-struck employers) would permit their employees to return to work (R. 26, 27). On May 27th, the seven non-struck employers locked out their employees. It was stipulated that:

> "The employees referred to in Paragraph VIII of the Complaint were laid off for the reason that their bargaining representative, Local 449, had engaged in a strike at the Frontier Linen Supply, Inc., Buffalo, New York, also a member of the Linen and Credit Exchange, the bargaining representative for all of its employer members" (J. A. 15; R. 18).

2. The Board's Decision: The trial examiner, based on the facts, concluded as a matter of law that the non-struck employers had discriminated against their employees, in regard to hire and tenure of employment to discourage membership in the Union, and thereby engaged in an unfair labor practice proscribed by Section 8(a)(3) and (1) of the Act (R. 30). The trial examiner noted that the instant case "resembles skeletally the much litigated *Morand and Davis* cases,[2] i.e. multi-employer bargaining with the Union through an employer association; a strike by the Union against one member of the Association; a lockout and lay-off of employees by the other members (R. 27). On closer scrutiny he observed that there was absent in the instant case, "facts which were accorded great, if not crucial significance at various stages of the Davis-Morand ligation *(ibid)*". The Board upon the facts decided, with member Murdock dissenting:

> "in these circumstances we think the more reasonable inference is that, although not specifically announced by the Union, the strike against the one employer necessarily carried with it an implicit threat of future strike action against any or all of the other members of the Association. For the Union's action represents a familiar technique of exerting economic pressure to atomize the employer solidarity which is the fundamental aim of the multi-employer relationship • • • Therefore, and in the absence of any independent evidence of antiunion motivation, we find that the action in shutting their plants until termination of the strike at Frontier was defensive and privileged in nature, rather than retaliatory and unlawful" (J. A. 40; R. 46).

---

[2] Morand Brothers Beverage Co., 91 N. L. R. B. 409; 190 F. 2d 576 (C. A. 7); 99 N. L. R. B. 1448 (on remand); 204 F. 2d 529 (C. A. 7). Leonard *et al.*, d/b/a Davis Furniture Co., 94 N. L. R. B. 279; 197 F. 2d 435 (C. A. 9); 100 N. L. R. B. 1016 (on remand); 205 F. 2d 355 (C. A. 9).

The Board's language while seeming to say that by joining a multi-employer association an employer obtains the right to lockout its employees to preserve the solidarity of such association then states as its reasoning, inconsistently at best, that:

> "* * * a strike by employees against one employer member of a multi-employer bargaining unit constitutes a threat of strike action against the other employers, which threat, *per se*, constitutes the type of economic or operative problem at the plants of the non-struck employers which legally justifies their resort to a temporary lockout of employees" (J. A. 41; R. 46).

3. The decision of the Court of Appeals—The Court of Appeals, with Judge Waterman dissenting, decided that the employees were engaged in "concerted activities" for "their mutual aid or protection" guaranteed by Section 7; and citing from a host of decisions, held "that the right to strike and to support a strike constitutes 'concerted activity'" is so protected. Interference with this right by the employer constitutes a violation of 8(a)(1), and the lockout prompted as it was by a purpose to defeat employee organization or otherwise protected concerted activities is violative of the Act. Such a lockout also violates 8(a)(3) of the Act (B. A. 20, 21).

The Court then noted that "the Board, in its brief, concedes as it must the basic principle that an employer who locks out its employees on mere threat of, or in anticipation of, a strike is guilty of an unfair labor practice" (B. A. 21). The Court noted those cases in which the Board had found justification for this otherwise illegal activity. The cases noted (B. A. 21) were unusual ones involving extreme economic hardship.

The Court found that:

> "The stipulated facts show no economic justification for the lockout * * *" (B. A. 33).

The Court noted that multi-employer bargaining had never received the express sanction of Congress (B. A. 31) but even if it be assumed that Congress gave legislative approval to prior Board rulings relative to such bargaining, "the Board at that time had not gone to the extreme lengths to which it now seeks to go in order to maintain the 'stability of the employer unit' ". Such radical innovations might stem from the study of the joint committee it set up under Section 402 of the Act to study among other things, "the methods and procedures for best carrying out the collective bargaining process, with special attention to the effect of industry wide or regional bargaining upon the national economy".

The Court then stated:

> "We feel the Board's action in restricting employees in the exercise of rights which Congress has expressly protected (Sections 7 & 13) to effectuate a policy (preserving the solidarity of multi-employer groups for employers) as to which Congress has, as yet, expressed no clear opinion, constitutes an abuse of the Board's legitimate authority under the Act and a usurpation of the power of Congress. Neither the Board nor the Courts may make, so fundamental a change in the existing law as that which would result from the Board's decision. The problems involved in legalizing the lockout in multi-employer situations are manifold, and their solution must be left to Congress".

Reasons for Denying the Writ

The Board would have it that the decision below is in conflict with that of the Ninth Circuit in *Davis Furniture*

v. National Labor Relations Board, 197 F. 2d 435, 205 F. 2d 355.

The Court below merely disagreed with certain *reasoning* of the Ninth Circuit ("We think *this* reasoning of the Ninth Circuit erroneous") (B. A. 23). The Court below further observed "The Board, although relying on the decision of the Ninth Circuit in *Leonard,* goes somewhat further in its reasoning" (B. A. 25).

The Union in the Court below in its brief and oral argument made the very point that while the Board said it was merely applying the rule of the *Davis* case, that the Board was going beyond the Davis case. In the *Davis* case, the Ninth Circuit noted specifically that the anticipated strike (which was announced) "threatened the loss of customers and a cessation of the Dealer's Market" and it was this fact that led the Ninth Circuit to distinguish it from the case of *N. L. R. B. v. Sommerset Classics,* 193 F. 2d 613 (C. A. 2). In the instant case there is not a shred of evidence to support the conclusion that the implied threat of strike threatened a loss of customers and a cessation of the Linen market.

The trial examiner accurately distinguished the cases as follows:

"Certainly, it can be said that under the rationale of the Board's decisions in the Morand and Davis cases, (the non-struck employers) conduct was unquestionably unlawful, since it constituted a reprisal against the employees because the Union, as their bargaining representative, had engaged in a lawful strike against Frontier. Thus, in the absence of evidence that strikes against other members were threatened or anticipated, that (the non-struck employers) were unable to operate without assurances

against being struck, that (they) had sought and failed to obtain such assurances, or, alternatively, assurances of adequate notice for the arrangement of their operations, it cannot be found that the lockout was defensive in nature. Stated differently, there was no showing that there were any economic considerations which justified the lockout, and none that the motive was in fact the protection of their economic interests." *C. F. Betts-Cadillac-Olds, Inc.*, 96 N. L. R. B. 268; *International Shoe Company*, 93 N. L. R. B. 159; *Duluth Bottling Association*, 48 N. L. R. B. 35 (J. A. 27-28; R. 34).

The petitioner thus overlooks a well established principle that "a judicial opinion, like a judgment, must be read as applicable only to the facts involved and is an authority for only what is actually decided", *People v. Chapman*, 370 Ill. 430, 455, and that "questions which merely lurk in the record, neither brought to the attention of the Court nor ruled upon, are not to be considered as having been so decided as to constitute precedents". *Webster v. Fall*, 266 U. S. 507, 511. See also *KVOS v. Associated Press*, 299 U. S. 269, 279; *U. S. v. Tucker*, 344 U. S. 33, 38.

The Union's counsel in response to questions put by the Court below stated very candidly his position that the decision of the Ninth Circuit in *Davis Furniture*, 197 F. 2d 435, 205 F. 2d 335 was erroneous. One can believe that the Court below is of a similar disposition. The point is that the instant case is factually different from the *Davis* case.

There is no conflict with the decision in the Seventh and Eighth Circuits. The decision by those Courts (B. A. pg. 22, n. 5) had different facts and the observations regarding the right of employers to lockout its employees as a corollary of the employees' right to strike were *dicta*.

The petitioner would create the conflict by the assumption that the Court below adopted "the motivation test" when the Court below found an absence of economic justification, without regard to motivation for this clear violation of the plain language of 8(a)(3) and (1) of the Act.

The petition further argues that if employers are disabled from using the sympathetic or secondary lockout that multi-employer bargaining will come to end. This argument assumes that multi-employer bargaining is good for the national welfare. There is nothing in the Act which would support such a premise and in the legislative history one can garner as many arguments against multi-employer bargaining as for it (B. A. pgs. 31-32, f. n. 13).

More fundamentally the Board now is willing to adopt the unproven assertion that the individual employers would be unable to stand above in bargaining with Local 449. But even assuming, *arguendo,* that employers required a united front, the Congressional inquiry by the joint committee set up under Section 402 of the Act might well be exploring the feasibility of an agreement among the employer's group, to save the struck employer harmless from financial losses incurred by the strike; supply service for the struck employer; the creation of a fund to meet this contingency; and agreements not to retain old customers acquired during the strike. No doubt there are other workable solutions to the problem.

Whatever can be gathered from the legislative history of the Act in support of a policy of multi-employer bargaining, there is not a shred of evidence that Congress ever considered the desirability of effectuating such policy by the grant of the right to lockout under the facts in this record.

Conclusion

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

McMAHON & CROTTY,
Counsel for Respondent.

PETER J. CROTTY,
THOMAS P. McMAHON,
of counsel.